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# In The Supreme Court of the United States

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,

*Petitioners,*

v.

EVON BILLUPS, *et al.*,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1.

Did the Court of Appeals properly reject Petitioners' equal protection challenge to Georgia's Photo ID Act based on this Court's decision in *Crawford v. Marion County Election Board*, 553 U.S. ___, 128 S. Ct. 1610 (2008), which just last term upheld a more restrictive photo ID law in Indiana against the same constitutional challenge?

2.

Is the Court of Appeals' decision upholding Georgia's Photo ID Act consistent with the decisions of this Court and other Courts of Appeals, which hold that the legitimate interest of States in preventing voter fraud and preserving public confidence in the integrity of elections outweigh the minimal burden imposed on voters by requiring the presentation of a photo ID when voting in person?

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## STATEMENT OF THE CASE

### A. Introduction

Less than one year after this Court decided essentially the same issue in *Crawford v. Marion County Election Board*, 553 U.S. ___, 128 S. Ct. 1610 (2008), Petitioners, contrary to this Court's "Considerations Governing Review on Certiorari," seek to raise again the question of whether a State's requirement of the presentation of a government-issued photographic identification when voting in person violates the Equal Protection Clause of the Fourteenth Amendment. *See* Sup. Ct. R. 10. Undoubtedly recognizing the harmony between the decision of the Court of Appeals for the Eleventh Circuit and the *Crawford* conclusion that no equal protection violation exists as well as an absence of conflict among the Circuits concerning this issue, Petitioners allege that the Court of Appeals somehow applied the wrong standard of review in reaching its conforming conclusion. Petitioners not only ignore the facts as developed in an extensive bench trial and misstate the reasoning of the Court of Appeals but also fail to raise any sufficient ground, let alone a "compelling reason," for the Petition to be granted. *See id.*

As the Petition fails to provide the Court with most of the relevant facts (and instead provides a "Statement" that is simply an extension of Petitioners' legal argument), Respondents provide the Court with an actual statement of the facts and proceedings below.

## B. Statement of Facts

Both before and after the enactment of Georgia's photo ID law, Georgia's registered voters could exercise their right to vote in one of two ways: (1) by absentee ballot or (2) at the polls. The photo ID law did not alter these methods of voting but changed certain procedures applicable to these processes.

First, both prior and subsequent to the photo ID law, a voter could vote before a primary or general election by absentee ballot submitted through the mail or in person at the registrar's office or absentee ballot clerk's office. *See* 2003 Ga. Laws 517, 537-39, §§ 35 & 36 (codified at O.C.G.A. §§ 21-2-380(b) & -381 (2003)). Prior to the enactment of the photo ID requirement for in-person voting, a registered voter, however, had to assert a specific statutory reason why he or she could not vote in person on the day of the primary or election in order to cast an absentee ballot. *See* 2003 Ga. Laws 517, 537-38, § 35 (codified at O.C.G.A. § 21-2-380(a) (2003)).

As a second option, prior to the enactment of the photo ID law, a registered voter could vote in person at the polls on the day of the primary or election by presenting one of seventeen documents specified in the law.[1] *See* 2003 Ga. Laws 517, 548-49, § 48

[1] Prior to the enactment of the photo ID law, a voter who cast an absentee ballot in person at the registrar's office also was required to present one of the seventeen forms of identification in order to vote. *See* 2003 Ga. Laws 517, 548-49, § 48 (codified at O.C.G.A. § 21-2-417(a) (2003)).

(codified at O.C.G.A. § 21-2-417(a) (2003)). In addition, a voter could vote without presenting any identification by signing a statement under oath swearing that he or she was the person identified on the elector's certificate. *Id.* (codified at O.C.G.A. § 21-2-417(b) (2003)). Accordingly, prior to 2005, other than reliance on the seventeen forms of identification (not all of which contained a photograph of the individual) or the sworn affidavit of voter, a poll worker in Georgia had no available methodology to verify that the person presenting one of these methods of identification was actually the registered voter whose name appeared on the voter registration list.[2]

In 2005, the Georgia General Assembly amended the State's election laws in two significant respects.

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[2] Although there is no photo ID requirement when voting by mail, to protect against voter fraud, the law requires election officials to take a number of steps to ensure that the person voting by mail is the same person who registered to vote. Upon receiving an absentee ballot application, a registrar or absentee ballot clerk must record the date of receipt and determine the applicant's eligibility to vote. *See* O.C.G.A. § 21-2-381(b)(1). Absentee ballots are mailed to applicants only after eligibility is determined according to law. *See* O.C.G.A. §§ 21-2-381(b)(2)-(4) & -384(a)(2). When the voted ballot is returned, the registrar or clerk is required to compare the identifying information and signature of the voter on the absentee ballot envelope with the voter's identifying information on both the voter registration application and absentee ballot application. *See* O.C.G.A. § 21-2-386(a)(1)(B). The records available at the registrar's office to compare identifying information for a registered voter who casts an absentee ballot are not available to the poll workers on primary or election day.

The first change permitted registered voters to vote an absentee ballot by mail without having to state an excuse for not voting in person on the day of a primary or election. *See* O.C.G.A. § 21-2-380(b). This change simply expanded the opportunity to vote by mail; it did not alter the documentation required to obtain an absentee ballot or require a photo ID to be submitted with the mail-in ballot. *See id.* § 21-2-381(a)(1)(C).

Second, in an effort to protect against in-person voter fraud,[3] the state legislature changed the

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[3] Petitioners attempt to make issue of the facts that Georgia's photo ID law contains no "legislative findings or a statement of legislative purpose" and there was no testimony from members of the legislature as to the intent to prevent voter fraud. *See* Petition at 3. Unlike the United States Congress, which has only delegated powers, the Georgia General Assembly's power is plenary and "is absolutely unrestricted in its power to legislate, so long as it does not undertake to enact measures prohibited by the State or Federal Constitution." *Bryan v. Ga. Pub. Serv. Comm'n*, 238 Ga. 572, 573, 234 S.E.2d 784, 785 (1977) (quoting *Sears v. State*, 232 Ga. 547, 554, 208 S.E.2d 93, 99 (1974)). Moreover, testimony of members of the Georgia General Assembly is inadmissible to explain the reasons for the enactment of specific legislation. *See Jackson v. Delk*, 257 Ga. 541, 543, 361 S.E.2d 370, 372 (1987); *Stewart v. Atlanta Beef Co.*, 93 Ga. 12, 18 S.E. 981 (1893). Finally, unlike the Congress, Georgia has no official legislative history for the enactment of statutes, *Dortch v. Atlanta Journal*, 261 Ga. 350, 355 n.4, 405 S.E.2d 43, 47 n.4 (1991) (Smith, J. dissenting), so the intent of statutes is gleaned from the plain meaning of the words used in light of the "old law," the "evil" the legislature intends to address, and the "remedy" applied by the operation of the new law. *See* O.C.G.A. § 1-3-1(a) & (b).

manner in which registered voters who vote in person could verify their identities. Registered voters who chose to vote in person were required to present one of the following forms of government-issued identification:

- a Georgia driver's license issued by the appropriate State agency;
- a valid photo ID card issued by any agency or branch of the United States or any State government agency;
- a valid United States passport;
- a valid employee photo ID card issued by the United States or a Georgia state or county government agency;
- a valid photographic United States military identification card; or
- a valid tribal photo ID card.

O.C.G.A. § 21-2-417(a). An in-person voter unable to produce any of these alternative forms of photo ID would be permitted to vote a provisional ballot, and that ballot would be counted if the registrar was able to verify current and valid identification of the registered voter no later than two days after the polls close. *Id.*

For those voters who did not possess one of the acceptable forms of photo ID and still wished to vote in person, photo ID cards were made available at service centers operated by the Georgia Department of Driver Services ("DDS"). The 2005 photo ID law

imposed a fee for such ID cards, but after a federal court entered a preliminary injunction,[4] the state legislature in 2006 repealed the fee provision and provided that photo ID cards would be available free of charge in each county voter registrar office as well as all DDS service centers. *See* O.C.G.A. §§ 21-2-417 & 417.1; *see also id.* § 40-5-103(d).

### C. Proceedings Below

On September 19, 2005, a group of non-profit corporations, organizations, and associations, along with two registered voters, filed a complaint against a group of county election officials and Cathy Cox, in her individual and official capacities as Georgia's then-Secretary of State and Chair of the State Election Board.[5] *Common Cause/Ga. v. Billups*, 406 F. Supp. 2d 1326, 1328 (N.D. Ga. 2005) ("*Common Cause/Ga. I*"). These plaintiffs alleged, in part, that Georgia's photo ID law enacted in 2005 violated the Fourteenth and Twenty-Fourth Amendments to the United States Constitution. *Id.*

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[4] *See infra* page 7.

[5] Shortly after the case was filed, one of the original two registered voters in the federal action dismissed his claims, and the State Election Board was added as a defendant. In addition, after the 2006 general election, Karen C. Handel succeeded Cathy Cox as Secretary of State of Georgia and Chair of the State Election Board. *See Common Cause/Ga. v. Billups*, 504 F. Supp. 2d 1333, 1337-38, 1341 (N.D. Ga. 2007).

On October 18, 2005, the District Court granted the plaintiffs' motion for preliminary injunction and enjoined the enforcement of the 2005 photo ID law. *Common Cause/Ga. I*, 406 F. Supp. 2d at 1377. First, the District Court found that, based solely on the evidence before it on the motion for preliminary injunction, there appeared to be a significant burden on the right to vote. Specifically, the District Court noted its concerns that (1) because the DDS service centers offering the photo ID cards were "not located in every Georgia county," the centers were not readily accessible to those who might need a photo ID to vote in person, *id.* at 1362-63, and (2) the State had not adequately educated voters about the new photo ID law or the changes to the absentee ballot provisions permitting absentee voting by mail without having to provide an excuse, *id.* at 1364. Second, the District Court found that the fee for a photo ID card issued by DDS constituted a poll tax in violation of the Twenty-Fourth Amendment to the United States Constitution. *Id.* at 1369-70.

Following the amendments by the state legislature in 2006 which eliminated the fees charged for photo ID cards and expanded the locations at which such ID cards were available to all 159 Georgia counties ("the 2006 Photo ID Act"), the plaintiffs asserted the same claims against the 2006 Photo ID Act as they raised in their original complaint against the 2005 photo ID law. *Common Cause/Ga. v. Billups*, 439 F. Supp. 2d 1294, 1298 (N.D. Ga. 2006) ("*Common Cause/Ga. II*"). On July 14, 2006, the District

Court granted a preliminary injunction, but only with respect to the July 18, 2006 primary and primary run-off elections. The District Court found that the State's limited efforts to educate voters by running public service announcements two weeks before the primary and distributing a letter at the polls on the day of the primary did not give voters adequate time to become aware of the 2006 Photo ID Act's requirements. *Id.* at 1346. Therefore, the District Court concluded that the plaintiffs had demonstrated a likelihood of success that the 2006 Photo ID Act unduly burdened the right to vote in those specific elections.[6] *Id.* at 1360. The District Court, however, emphasized the limitations on the reach of its order and offered the following guidance:

> In issuing this Order, the Court does not intend to imply that all Photo ID requirements would be invalid or overly burdensome on voters. Certainly, the Court can conceive of ways that the State could impose and implement a Photo ID requirement without running afoul of the requirements of the Constitution. Indeed, if the State allows sufficient time for its education efforts with respect to the 2006 Photo ID Act and if the State undertakes sufficient steps to inform

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[6] The District Court concluded that the plaintiffs had no substantial likelihood of success on the merits of their poll tax or Civil Rights Act claims. *Common Cause/Ga. II*, 439 F. Supp. 2d at 1355, 1357-58.

> voters of the 2006 Photo ID Act's requirements before future elections, the statute might well survive a challenge for such future.

*Id.* at 1351.

Two months later, on September 15, 2006, the District Court preliminarily enjoined the application of the 2006 Photo ID Act with respect to the September 2006 special elections. *See Common Cause/Ga. v. Billups*, 504 F. Supp. 2d 1333, 1340-41 (N.D. Ga. 2007) ("*Common Cause/Ga. III*"). Again, the District Court stressed that it was not ruling on any issue other than the appropriateness of a preliminary injunction for the September 2006 special election and reiterated its earlier guidance that if the State allowed sufficient time for its education efforts before an upcoming primary or election, the Act might well survive a constitutional challenge. *Id.* at 1349-50.

The District Court conducted a bench trial on the merits on August 22-24, 2007. At trial, the plaintiffs proceeded solely on their claim that the 2006 Photo ID Act unduly burdened their right to vote in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Id.* at 1342. State defendants, however, offered proof that beginning in early 2007 and up through the time of trial, Georgia's Secretary of State engaged in, as the District Court subsequently concluded, a "serious, concerted effort" to educate the State's voters concerning the requirements of the 2006 Photo ID Act,

the availability of free photo ID cards, and the ability to vote absentee by mail without a photo ID. *Id.* at 1365-68, 1380.

By Order dated September 6, 2007, the District Court dismissed the plaintiffs' case in its entirety and directed that judgment be entered in favor of the State defendants. First, the District Court held that the plaintiffs had failed to prove by a preponderance of the evidence that the remaining organizational plaintiff or the recently-added individual plaintiffs[7] had standing to sue. *Id.* at 1371-74. Second, the District Court concluded that even if standing existed and the merits of the action were considered, the 2006 Photo ID Act imposed no undue burden on the right to vote. *Id.* at 1377-80. The District Court found that the plaintiffs failed to produce admissible evidence to establish that the character and magnitude of the asserted injury was significant. *Id.* at 1377. The District Court also found that the State defendants' "exceptional" efforts to educate voters about the requirements of the 2006 Photo ID Act undertaken after the entry of the earlier preliminary

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[7] The District Court dismissed the original remaining individual plaintiff due to lack of standing after the Supreme Court of Georgia dismissed a lawsuit challenging the 2006 Photo ID Act on state constitutional grounds. Like the plaintiff in the state lawsuit, the remaining federal individual plaintiff possessed the same government-issued photo ID which could be used for in-person voting. *See Common Cause/Ga. III*, 504 F. Supp. 2d at 1341; *Perdue v. Lake*, 282 Ga. 348, 647 S.E.2d 6 (2007).

injunctions belied the plaintiffs' contention that voters were unaware of those requirements. *Id.* at 1378-79. Given that the plaintiffs "proffered precious little admissible evidence" to support their allegation that the photo ID requirement was burdensome and "failed to uncover anyone" who could attest to the fact that they would be prevented from voting due to that requirement, the District Court held that the 2006 Photo ID Act imposed no undue burden upon the right to vote and that the Act was a reasonable and legitimate enactment to satisfy the State's interest in preventing voter fraud. *Id.* at 1378, 1380-81.

> *Despite apocalyptic assertions of wholesale voter disenfranchisement, Plaintiffs have produced not a single piece of evidence of any identifiable registered voter who would be prevented from voting pursuant to [the 2006 Photo ID Act] because of his or her inability to obtain the necessary photo identification.* Similarly, Plaintiffs have failed to produce any evidence of any individual . . . who would undergo any appreciable hardship to obtain photo identification in order to be qualified to vote.

*Id.* at 1380 (quoting *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 822-23 (S.D. Ind. 2006), *aff'd sub nom. Crawford v. Marion County Election Bd.*, 472 F.3d 949 (7th Cir. 2007), *aff'd*, 128 S. Ct. 1610) (alterations in original and emphasis added).

On January 14, 2009, the Court of Appeals for the Eleventh Circuit held that the District Court did

not abuse its discretion when it declined to enjoin the enforcement of the 2006 Photo ID Act. *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1355 (11th Cir. 2009) ("*Common Cause/Ga. IV*"). Although the Court of Appeals disagreed with the District Court that the NAACP and individual voters lacked standing to challenge the photo ID requirement, the Court of Appeals concluded that the District Court properly applied the flexible standard from *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992), and correctly held that "the burden imposed on Georgia voters who lack photo identification was not undue or significant." *Common Cause/Ga. IV*, 554 F.3d at 1354.

The Court of Appeals agreed with the District Court that the burden imposed upon Georgia voters by the Act was not "undue or significant" and that the inability to locate a single voter who could not obtain a free photo ID card or otherwise vote belied the plaintiffs' claims that the requirements of the law were burdensome. *Id.* Moreover, "[t]he interest of Georgia in detecting and deterring voter fraud is a 'valid neutral justification[]' that this Court cannot ignore." *Id.* at 1355 (quoting *Crawford*, 128 S. Ct. at 1624) (brackets in original). Consequently, the Court of Appeals held that the District Court did not abuse its discretion when it denied the plaintiffs' request for a permanent injunction against the enforcement of the Act and rendered judgment in favor of the State's officials. *Id.* at 1355, 1357.

## REASONS FOR DENYING THE PETITION

The decision below does not conflict with a decision of this Court or any Court of Appeals, nor does it implicate an important federal question that has not been decided by this Court. In fact, just last term, this Court in *Crawford v. Marion County Election Board* upheld Indiana's photo ID law for in-person voting against a similar equal protection challenge. Petitioners have not carried their burden of demonstrating any "compelling reasons" for the Petition to be granted. *See* Sup. Ct. R. 10.

### I. The Court of Appeals Properly Upheld Georgia's Photo ID Law Based on This Court's Recent Decision in *Crawford v. Marion County Election Board*.

The Court of Appeals properly rejected Petitioners' challenge to Georgia's 2006 Photo ID Act based on this Court's decision last term in *Crawford v. Marion County Election Board*, 553 U.S. ___, 128 S. Ct. 1610 (2008). In *Crawford*, this Court upheld a more restrictive Indiana photo ID law against the same equal protection challenge at issue in this case. Petitioners attempt to distinguish *Crawford* by emphasizing that the record is more complete in this case because a trial on the merits occurred as opposed to a ruling on summary judgment. However, the completeness of this record and the lack of any evidence to establish a significant burden upon the right to vote underscores why *Crawford* is equally dispositive of the issues here.

First, this Court noted in *Crawford* that the plaintiffs had not presented a single voter who had been harmed by the photo ID law. *See* 128 S. Ct. at 1614 (noting that the district judge found that the plaintiffs had "not introduced evidence of a single, individual Indiana resident who will be unable to vote as a result of SEA 483 or who will have his or her right to vote unduly burdened by its requirements"). After two years of litigation in the District Court and a full trial on the merits, the evidence in this case suffered from the same lack of actual harm to any voter. *See Common Cause/Ga. IV*, 554 F.3d at 1354 (stating that Petitioners, "despite their best efforts, failed to identify a single individual who would be unable to vote because of the Georgia statute or who would face an undue burden to obtain a free voter identification card").

The only alleged harm to any registered voters was that if they exercised their right to vote in person, as opposed to voting absentee by mail, they would be required to obtain a free photo ID card if they did not already possess an otherwise qualifying photo ID. As this Court explained in *Crawford*, "the inconvenience of making a trip to the [appropriate government agency], gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." *Crawford*, 128 S. Ct. at 1621; *see Common Cause/Ga. III*, 504 F. Supp. 2d at 1377-78, 1380-81 (addressing the ability of each of the

individual Petitioners and two additional trial witnesses to obtain a photo ID without difficulty).

Second, both at trial and in their Petition, Petitioners contended that "hundreds of thousands" of Georgia voters lack a driver's license, *see* Petition at 17-18, but, as the Court of Appeals explained, the data match inquiry that produced a list of voters who allegedly lacked driver's licenses was seriously flawed. *See Common Cause/Ga. IV*, 554 F.3d at 1354 ("The data relied on by the NAACP and voters are incomplete and unreliable. The data matches fail to account for other forms of identification that are acceptable under the statute, including the free voter identification cards."). The data relied upon by Petitioners also contained numerous inaccuracies in which persons with driver's licenses (including the District Judge) erroneously appeared on the data match list as not having a driver's license. *See id.* Just as in *Crawford*, Petitioners here have failed to provide any evidence of "the number of registered voters without photo identification," and this Court has stressed that mere supposition cannot substitute for actual "concrete evidence" of a real "burden imposed on voters who currently lack photo identification." 128 S. Ct. at 1622.

Third, Petitioners attempt to distinguish *Crawford* by saying that there was no record evidence in that case of discriminatory impact of African-Americans. *See* Petition at 18. That distinction, however, cannot be made because, in fact, Petitioners' case also lacked any admissible evidence on that issue. *See Common*

*Cause/Ga. IV*, 554 F.3d at 1354 (noting that Petitioners argued that the statute affects "between 5 and 10 percent of all registered voters, largely minorities, *but the record tells a different story*") (emphasis added).

Indeed, in addition to not identifying a single individual – of any race – who would be prevented from voting, *see id.*, the District Court found the testimony of Petitioners' expert witness on the issue of discriminatory impact to be so unreliable that the court excluded it pursuant to this Court's precedent in *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and its progeny. *See Common Cause/Ga. III*, 504 F. Supp. 2d at 1371, 1378.

Finally, Petitioners contend that the political party-line vote for passage of Georgia's photo ID law supports the granting of their Petition, notwithstanding that in *Crawford* this Court explained that partisanship provided no basis for overturning the Indiana statute. *See Crawford*, 128 S. Ct. at 1624. Petitioners' argument that the Georgia photo ID law was enacted for partisan advantage is no different than the one raised in *Crawford*. In rejecting this argument, the Court of Appeals expressly applied this Court's analysis from *Crawford*:

> The NAACP and voters also argue that the statute was "adopted to gain partisan advantage," but the Supreme Court dismissed the relevance of partisan interests in *Crawford*. "[I]f a nondiscriminatory law is supported by valid neutral justifications, those justifications should not be disregarded simply

> because partisan interests may have provided one motivation for the votes of individual legislators." The interest of Georgia in detecting and deterring voter fraud is a "valid neutral justification[]" that this Court cannot ignore.

*Common Cause/Ga IV*, 554 F.3d at 1355 (quoting *Crawford*, 128 S. Ct. at 1623-24) (brackets in original and internal citations omitted).

In contrast to Petitioners' lack of admissible evidence regarding the Georgia photo ID law's burden on the State's voters, the State of Georgia undertook great efforts to ensure that no one is prevented from voting because of the photo ID law. In fact, Justice Breyer's dissent from the *Crawford* decision itself recounts these efforts and recognizes that there is a lesser burden imposed by the Georgia law than by the Indiana law. 128 S. Ct. at 1644-45. As Justice Breyer explained, "[b]y way of contrast, . . . Georgia [has] put into practice photo ID requirements *significantly less restrictive* than Indiana's." *Id.* at 1644 (emphasis added).

Justice Breyer cited four major examples to support his conclusion. Initially, Justice Breyer noted that Georgia "accepts in addition to proof of voter registration a broader range of underlying documentation than does Indiana." *Id.* (citing O.C.G.A. § 21-2-417 and Ga. Comp. Rules & Regs. 183-1-20.01). Justice Souter's dissent in *Crawford*, joined by Justice Ginsburg, likewise recognizes that the burdens of obtaining photographic identification are less in

Georgia than Indiana because one can obtain a Georgia voter identification card even without presentation of a birth certificate. *See id.* at 1635 n.26 ("Only one other State, Georgia, currently restricts voters to the narrow forms of government-issued photo identification. But a birth certificate is not needed to get a Georgia voter identification card.") (citing O.C.G.A. §§ 21-2-417 & -417.1 and Ga. Comp. Rules & Regs. 183-1-20.01).

Second, no person lacking a photo ID is prohibited from voting in Georgia because Georgia has no-excuse-required absentee voting, and any Georgia voter can vote absentee by mail without needing to present photographic identification. As Justice Breyer explained, "[w]hile Indiana allows only certain groups such as the elderly and disabled to vote by absentee ballot, *in Georgia any voter may vote absentee without providing any excuse*, and (except where required by federal law) *need not present a photo ID* in order to do so." *Id.* at 1645 (emphasis added).

Third, Indiana law provides that, although "[a] voter who is indigent . . . may cast a provisional ballot," the ballot "will be counted only if she executes an appropriate affidavit before the circuit court clerk within 10 days following the election." *Id.* at 1613-14 (citing Ind. Code Ann. §§ 3-11.7-5-1 & -2.5(c)). Justice Breyer noted that, in contrast, "Georgia [does not] insist[ ], as Indiana does, that indigent voters travel each election cycle to potentially distant places for the

purposes of signing an indigency affidavit." *Id.* at 1645.

Fourth, Justice Breyer emphasized the District Court's finding of Georgia's "serious, concerted effort to notify voters who may lack Photo ID cards of the Photo ID requirement, to inform those voters of the availability of free [State-issued] Photo ID cards or free Voter ID cards, to instruct the voters concerning how to obtain the cards, and to advise the voters that they can vote absentee by mail without a Photo ID." *Id.* (quoting *Common Cause/Ga. III*, 504 F. Supp. 2d at 1380) (brackets in original).

This case, when compared with *Crawford*, shows that the same issues decided there are again being brought before this Court by the Petition. Indeed, when the actual evidence from the bench trial is considered, the establishment of the lack of any significant burden among registered voters by the implementation of Georgia's photo ID law is even stronger than the evidence which led this Court to uphold Indiana's photo ID law in *Crawford*.

## II. The Court of Appeals' Decision Is Consistent With the Decisions of This Court and Other Courts of Appeals Which Establish That a State's Legitimate Interest in Preventing Voter Fraud Outweighs the Minimal Burden Imposed on Voters by a Photo ID Requirement for In-Person Voting.

*Anderson v. Celebrezze*, 460 U.S. 780 (1983), provides that Petitioners initially must demonstrate actual harm, and a court must first consider the "character and magnitude" of the asserted injury. *Id.* at 789. Petitioners provided the District Court with a paucity of admissible evidence that Georgia's 2006 Photo ID Act imposed any burden upon voting, other than the minimal burden that some individuals who desired to vote in person and lacked a photo ID would need to visit their county elections registrar or a DDS office to obtain a free photo ID card.

In fact, notwithstanding Petitioners' statement that "the decisions of a court must be based on admissible evidence in the record, and not [on] unproven assumptions or hearsay," the allegations on which they rely throughout their Petition are not the admissible evidence presented at trial, but rather consist of what was presented at the preliminary injunction hearings and ultimately was shown at trial not to be correct. *See* Petition at 9, 11-14 & 17-19. As the District Court noted in its decision following the bench trial:

> Although Plaintiffs contended at the preliminary injunction hearings that many voters

> who do not have driver's licenses, passports, or other forms of photographic identification have no transportation to a voter registrar's office or DDS service center, have impairments that preclude them from waiting in often-lengthy lines to obtain Voter ID cards or Photo ID cards, or cannot travel to a registrar's office or a DDS service center during those locations' usual hours of operation because the voters do not have transportation available, *Plaintiffs failed to produce admissible evidence to that effect at trial.*

*Common Cause/Ga. III*, 504 F. Supp. 2d at 1377 (emphasis added). Moreover, the District Court noted that some of the very statements in its preliminary injunction orders on which Petitioners rely, *see* Petition at 11, were "speculation . . . not binding on the Court" that "frankly, proved to be inaccurate."[8] *Id.* at 1381 n.9.

Notwithstanding Petitioners' assertions of hundreds of thousands of voters who lack photo ID for in-person voting, the only evidence that Petitioners

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[8] Additionally, Petitioners' statement that the District Court's factual findings at the preliminary injunction hearings "were based on testimony and documents that would have been 'admissible at trial' and were a 'part of the record,'" Petition at 12 n.2 (citing Fed. R. Civ. P. 65(a)), is not correct. The District Court itself noted that the declarations of several Georgia voters who lacked photo ID cards, which Petitioners proffered in connection with the 2005 and 2006 preliminary injunction hearings, were hearsay that had not been rendered admissible at trial. *See Common Cause/Ga. III*, 504 F. Supp. 2d at 1351.

presented of any harm caused by the 2006 Photo ID Act was testimony of four individuals – two individual Petitioners who testified at trial and two other witnesses who testified by deposition – all of whom said they could obtain a free photo ID card for voting without much difficulty.

For example, one of the individual Petitioners said that her family and friends often drive her wherever she needs to go and could drive her to her county registrar's office to get a free photo ID card for voting, and she would, in fact, get a free photo ID card for voting if the law was upheld. *See id.* at 1348-49, 1377-78. The second individual Petitioner said he has not voted in over twenty years, but his daughter or a friend drives him where he needs to go, and his daughter would drive him to his polling place if he voted again, which is about the same distance from his home as his county registrar's office where he can obtain a free photo ID card for voting. *See id.* at 1350-51, 1377-78. He also said his daughter could assist him with voting an absentee ballot. *See id.* at 1350. One of the other witnesses said that she was able to drive with family or friends to obtain a free photo ID card, and the final witness said that he could walk to his county registrar's office only one-quarter mile away without hardship to obtain a free photo ID card for voting. *See id.* at 1351-54, 1377-78.

Accordingly, the only admissible evidence that Petitioners provided at trial was that four Georgia registered voters would simply be required to obtain a free photo ID card for voting in a one-time trip to

their county voter registrar's office.[9] This Court explained in *Crawford* that "the inconvenience of making a trip to the [appropriate government agency], gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." *Crawford*, 128 S. Ct. at 1621.

Judged against this minimal burden to voters is the State of Georgia's compelling interest in preserving the integrity of its elections and protecting against voter fraud. *See, e.g.*, *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (quoting *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989)) ("A State indisputably has a compelling interest in preserving the integrity of its election process."), *quoted in Common Cause/Ga. III*, 504 F. Supp. 2d at 1381. As this Court has explained:

> Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised. "[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as

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[9] Georgia has 159 counties, more than any other State except Texas.

> effectively as by wholly prohibiting the free exercise of the franchise."

*Purcell*, 549 U.S. at 4 (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)), *quoted in Common Cause/Ga. III*, 504 F. Supp. 2d at 1381; *see Crawford*, 128 S. Ct. at 1619 ("There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters.").

Without any support, Petitioners argue for an increased standard to support a State's justification for enacting a photo ID law. However, this Court in *Crawford* upheld Indiana's photo ID law despite the fact that the Indiana statute addressed only in-person voter impersonation at the polls when "[t]he record contain[ed] *no evidence of any such fraud actually occurring in Indiana at any time in its history*." 128 S. Ct. at 1619 (emphasis added). Moreover, based on the facts of this case, the District Court specifically found that "the evidence in the record is sufficient to support a finding that [Respondents] introduced the 2006 Photo ID Act in an effort to prevent fraud in voting." *Common Cause/Ga. III*, 504 F. Supp. 2d at 1381 n.8.

As the Court of Appeals explained in applying this Court's precedent from *Crawford*, *Anderson*, and *Burdick*, although the State of Georgia must identify the interests that it seeks to further, no actual evidentiary showing is required:

> *Anderson* requires a state to "identif[y the] . . . interests that it seeks to further by its"

> regulation, but *Anderson* does not require any evidentiary showing or burden of proof to be satisfied by the state government. In *Anderson*, the Supreme Court considered the interests posited by Ohio – voter education, equal treatment of all candidates, and political stability – but did not discuss any record evidence in support of those stated interests. Nor do the more recent decisions in *Burdick* and *Crawford* place an evidentiary burden on the state when defending a voting regulation.

*Common Cause/Ga. IV*, 554 F.3d at 1353 (brackets and ellipsis in original and citations omitted).

This Court "did not require Indiana to prove specific instances of voter fraud" in *Crawford*, and there likewise is no basis to place such a requirement on Georgia in this case. *Id.* In fact, this Court has emphasized:

> Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. *The legislature may select one phase of one field and apply a remedy there, neglecting the others.*

*Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955) (emphasis added and citations omitted). As the Court stated in *Crawford*, "[w]hile the most effective method of preventing election fraud may

well be debatable, the propriety of doing so is perfectly clear." *Crawford*, 128 S. Ct. at 1619.

Additionally, Georgia has put into place several procedures to mitigate any burden that the photo ID requirement might impose. First, individuals without a photo ID for in-person voting can vote absentee by mail without having to provide an excuse why they cannot vote on the day of the primary or election. *Common Cause/Ga. III*, 504 F. Supp. 2d at 1379; *see Crawford*, 128 S. Ct. at 1645 (Breyer, J., dissenting) ("[I]n Georgia any voter may vote absentee without providing any excuse, and (except where required by federal law) need not present a photo ID in order to do so."). Second, State defendants presented evidence at trial of their "serious, concerted effort" to educate voters about the photo ID requirement, which Justice Breyer's dissent in *Crawford* references in distinguishing Georgia's law from Indiana's. *Common Cause/Ga. III*, 504 F. Supp. 2d at 1380, *quoted in Crawford*, 128 S. Ct. at 1645. Third, anyone in Georgia who shows up at the polls on an election day without a valid photo ID can vote a provisional ballot. *Common Cause/Ga. III*, 504 F. Supp. 2d at 1344 (quoting O.C.G.A. § 21-2-417(b)); *see Crawford*, 128 S. Ct. at 1621 ("The severity of that burden is, of course, mitigated by the fact that, if eligible, voters without photo identification may cast provisional ballots that will ultimately be counted.").

In short, as the Court of Appeals recognized, the "insignificant burden" that the Georgia photo ID law imposes is outweighed by the State's interest in

preserving the integrity of its elections and the serious efforts that the State has taken to mitigate even the minimal burden of the law:

> The insignificant burden imposed by the Georgia statute is outweighed by the interests in detecting and deterring voter fraud. Because the burden on Georgia voters is "slight," the state interest need not be "compelling . . . to tip the constitutional scales in its direction." The legitimate state interest in preventing voter fraud, as recognized in *Crawford*, is more than "sufficient to outweigh the limited burden" of producing photo identification.

*Common Cause/Ga. IV*, 554 F.3d at 1354-55 (quoting *Burdick*, 504 U.S. at 439-40) (ellipsis in original).

Petitioners have failed to state a compelling reason why their Petition should be granted. *See* Sup. Ct. R. 10. The Court of Appeals properly analyzed and rejected Petitioners' challenge to the 2006 Photo ID Act based on this Court's holding in *Crawford*. To grant this Petition would both alter the role of this Court in reviewing decisions of the Courts of Appeals and violate the most basic notions regarding the importance of evidence, not mere unproven allegations, in our system of jurisprudence.

## CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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